SUPREME COURT, U.S.
JUN 29 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1961.

No. 208

MILDRED SEXTON, Executor of the Last Will of Bertha Birk Klein, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on March 22, 1962.

CITATION TO OPINION BELOW.

The District Court did not issue a written opinion in this case. The opinion of the Court of Appeals is printed in Appendix B, *infra* at p. 5a, and is reported in 300 F. 2d 490.

JURISDICTION.

The Judgment of the Court of Appeals was entered on March 22, 1962. The Petition for a Rehearing was denied by the Court of Appeals on April 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether, prior to the termination of a spendthrift trust created by another, a beneficiary has any interest in corpus for federal estate tax purposes.

2. Whether, by joining in the postponement of the termination date of a spendthrift trust, a person has made a transfer of corpus for federal estate tax purposes even though no other person received anything because of such postponement.

3. Whether a person's retention of income for a specified period is a retention of income for life under section 2036 of the Internal Revenue Code of 1954 even though the person survived the period specified.

4. Whether a beneficiary's interest in the corpus of a spendthrift trust has any value for federal estate tax purposes if the beneficiary at no time could have secured distribution thereof because distribution was subject to being postponed by others without the beneficiary's consent and was in fact so postponed by others beyond her lifetime.

STATUTE INVOLVED.

The statutory provision involved in this case is Section 2036 of the Internal Revenue Code of 1954. This statutory provision is printed in Appendix A, *infra*, at p. 1a.

STATEMENT.

Jacob Birk created a living trust in 1918 in which he named his seven children as beneficiaries of the income. The decedent in this case was one of the named beneficiaries. The trust contained a spendthrift provision and further stated that no beneficiary should have any interest in corpus. If any beneficiary died before the termination of the trust he was given a power, by will, to appoint among the lineal descendants of the settlor. The trust, by its terms, was to terminate twenty years after the settlor's death but provided that it could be amended and modified by a combination of people consisting of at least two-thirds of the beneficiaries and all of the trustees.

Jacob Birk died on March 2, 1920. By its terms the trust would have terminated on March 2, 1940. However, by successive amendments in 1940, 1950 and 1955, the requisite number of beneficiaries and trustees amended the termination provision of the trust to extend its term. Bertha Birk Klein, the decedent in the instant case, joined in the 1940 and 1950 extension amendments but did not join in the 1955 amendment. At that time she was an adjudged incompetent.

This decedent died on October 22, 1955, having survived the periods established in the two extension amendments signed by her. She did not survive the period established by the extension amendment in which she did not join. A federal estate tax return was filed in which no portion of the trust was included. An estate tax deficiency was assessed on the theory that the term of the trust could not be validly extended and the situation should be treated as though the original trust had terminated in 1940 and the decedent had created a new trust of her own property in which she reserved income for life. The deficiency was paid, a claim for refund was filed and denied and suit for refund was brought in the United States District Court

for the Northern District of Illinois, the jurisdiction of that Court being invoked under the provision in 28 U.S.C. §1346 (a)(1). The District Court denied the refund. An appeal to the United States Court of Appeals for the Seventh Circuit was taken, the judgment of the District Court was affirmed and appellant's petition for rehearing was denied.

The Court of Appeals held that the trust had been validly extended but that the decedent, by joining in the 1940 postponement which extended the trust for a ten year period, had relinquished her right to corpus and retained income for life. The value of her equitable share in trust corpus was found to be taxable but the court did not determine what value, if any, was to be allocated to that equitable share.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals in the instant case is directly in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Brown* v. *Routzahn*, 63 F. 2d 914 (6th Cir. 1933) *cert. denied*, 290 U.S. 641 (1933) and is probably contrary to the principles underlying this Court's decision in *Helvering* v. *Grinnell*, 294 U.S. 153 (1934).

The decision in the instant case deals with concepts which are basic to the federal estate tax law, viz: what constitutes an interest in property and what constitutes a transfer of property. It reaches conclusions with respect to these concepts which are contrary to conclusions reached by other federal courts and which are both unsound and unjustified.

If allowed to stand, the decision will add confusion in an area of tax law where clarity is demanded in the public interest.

In order to demonstrate the conflict and confusion created by the decision below, it is necessary to detail both the requirements for taxability under Section 2036 of the Code and certain prior cases which dealt with the same concepts.

For taxability to result under section 2036 of the Internal Revenue Code of 1954,[1] three requirements must be met. First, the decedent must have had an interest in property. Second, he must have made a transfer of that interest. Third, the transfer must have been one under which the decedent retained an interest for at least one of three periods specified by that section.

I.

Did the decedent have an interest in property?

If a person has refused to take property offered to him, it is necessary, for estate tax purposes, to determine to what extent, if any, he ever had an interest therein.

For over eight hundred years the law was well settled—an heir could not refuse to take the title cast upon him. Under the feudal system "The lord had to be sure of his relief and the nation of its defenders; such matters could not rest upon the election of an heir as to whether he would perform his duties." Lauritzen, *Only God Can Make an Heir*, 48 NW. U.L. Rev. 568, 570 (1953); 2 Blackstone, Commentaries *196; Coke, Commentaries On Littleton

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[1] "(1)(a) **General Rule**—The value of the gross estate shall include the value of all property * * * to the extent of any interest therein of which the decedent has at any time made a transfer * * * under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from the property, or . . ."

§§18(b), 237(a) (18th ed., Butler and Hargrave, 1823). Title came to the heir by the single operation of law. 2 BLACKSTONE, COMMENTARIES *201.

However, a legatee under a will could refuse his legacy because title by will was less worthy than that by descent. *Warren* v. *Rudall*, 70 Eng. Rep. 637 (1858); 4 PAGE ON WILLS § 1402 (3d ed. 1941). Title by deed was also less worthy and the beneficiary of a trust had the undoubted power to reject. *Standing* v. *Bowring*, 31 Ch. D. 282, 286 (1885); 1A BOGERT, TRUSTS AND TRUSTEES § 173 (1951).

Although such basic property law concepts are not conclusive for tax purposes, *Helvering* v. *Hallock*, 309 U.S. 106 (1939), it often becomes necessary, for tax purposes only, to interpret the language of section 2036 of the Internal Revenue Code of 1954 which includes, for estate tax purposes, the value of property "to the extent of any interest therein." Prior to the decision in the instant case, there appeared to be four major decisions which required consideration.

Brown v. *Routzahn*, 63 F. 2d 914 (6th Cir. 1933), *cert. denied* 290 U.S. 641 (1933), involved a right to receive property under a will. The Court of Appeals for the Sixth Circuit held that although the legatee could have received the property merely by awaiting distribution, he had rejected his right to receive and never acquired an interest in property for federal estate tax purposes.

After the *Brown* case was decided, the Third Circuit rendered its decision in *Cerf* v. *Commissioner*, 141 F. 2d 564 (3rd Cir. 1944), and held that because a beneficiary's right to receive income from a trust had become vested in her, her later relinquishment of that right was a taxable relinquishment of an interest in property. The court required the existence of a vested interest before taxability could result. The Court of Appeals in the instant case

relied on the *Cerf* case as the basis for its decision but, unlike the court in the *Cerf* case, it did not find that the decedent's interest was vested. It found instead that her interest was subject to postponement by others without her consent.

Next came the decision of the Court of Appeals for the Eighth Circuit in *Hardenbergh* v. *Commissioner*, 198 F. 2d 63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952) which held that although heirs had disclaimed their interests in an intestate estate, title had vested in them by force of the rules of law and, in spite of their wishes, they had acquired an interest in property for gift tax purposes. This case distinguished the *Brown* case and emphasized the ancient property law distinctions by stating, "The rule is otherwise as to legatees or devisees under a will, Brown v. Routzahn, 6 Cir., 63 F. 2d 914, since the beneficiary under a will may accept or reject a testamentary gift." 198 F. 2d 66.

In the meantime this Court had rendered its decision in *Helvering* v. *Grinnell*, 294 U.S. 153 (1934). In that case a decedent had exercised a power of appointment which was rejected by the appointees. This Court held that the right of a grantee of a power to reject is the same as that of a grantee under a deed and stated that it is "clear that no property passed under the power or as a result of its exercise since that result was rejected by the beneficiaries." 294 U.S. 155.

Of these four cases, only one (*Hardenbergh*) involved the worthier title of an heir and the other three involved the less worthy title of a legatee, trust beneficiary or appointee. However, two of these (*Cerf* and *Hardenbergh*) resulted in taxability and two of them (*Brown* and *Grinnell*) did not. It might have been possible, for tax

purposes, to reconcile the four decisions on the ground that *Cerf* and *Hardenbergh* involved fully matured interests (the respective courts found them to have been vested), while in *Brown* and *Grinnell* the interests of the intended recipients never matured because they were rejected before maturity. Nevertheless, there were broad differences of opinion among the writers on the subject. Sheldon V. Ekman pointed up the "complete absurdity of the present state of the law". N.Y.U. 11th Inst. On Fed. Tax 527, 532 (1953). The Note appearing in 31 Texas L. Rev. 599 (1953) evidences the belief that the *Hardenbergh* and *Brown* cases are indistinguishable and that the *Hardenbergh* decision was correct. E. and S. Rohner, in the article entitled *Renunciation as Taxable Gift—An Unconstitutional Federal Tax Decision*, 8 Tax L. Rev. 289 (1953), argued that the *Hardenbergh* decision was unconstitutional. In the Note, *Disclaimers in Federal Taxation*, 63 Harv. L. Rev. 1047 (1950), it is stated: "Neither Code nor court decisions provide a wholly satisfactory answer * * *." Taxpayers and their attorneys were unable to forecast the results of their planning. The decision in the instant case further compounds the confusion because it is inconsistent with whatever thread of consistency there was in the prior cases.

Although the *Brown* case involved a legatee and the instant case involves a trust beneficiary, the nature of the rights involved in each case is the same. Each intended recipient would have received distribution if nothing further had been done. Neither of them had the worthier title formerly attributed to an heir. Each, at any time prior to distribution, could reject. In the *Brown* case the decedent did reject. The Court of Appeals in the instant case found that the decedent relinquished her right to receive. Whether on the basis of property law concepts or

irrespective of those concepts, neither interest had matured because, prior to maturity, each intended recipient had taken actions specifically designed to keep the interest from maturing. Nevertheless, the two decisions reach opposite conclusions. The conflict with the *Brown* decision is emphasized if it is realized that in *Brown*, the decedent, by his decision alone, could have elected to take the property. In the instant case, distribution to the decedent was subject to postponement by others without her consent, and was in fact so postponed beyond her lifetime. At no time could she have secured distribution. Her interest, if any, was less than that involved in *Brown*.

By relying on the *Corf* case which involves a different right, by ignoring the *Brown* case which involves the same right, and by not recognizing the distinctions made in the *Hardenbergh* decision or the principles underlying the *Grinnell* decision, the decision of the Court of Appeals in the instant case creates additional doubts in an area that was already confusing.

Moreover, the decision of the Court of Appeals in the instant case has an unfortunate impact on the most recent efforts to bring some consistency to the law in this area. Realizing that there is no longer any reason to retain the ancient distinctions between an heir on the one hand and a legatee and grantee on the other, at least eleven states have recently enacted statutes generally referred to as "disclaimer statutes"[2] These statutes pur-

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[2] Colorado—Col. Rev. Stat. Ann. § 152-5-44 (1953, Supp. 1961)
Illinois—Ill. Rev. Stat. ch. 3 § 15 d (1961)
Indiana—Ind. Stat. Ann. 6-604 (Burns, 1953)
Kentucky—Ky. Rev. Stat. § 394.320 (1960)
Missouri—Mo. Ann. Stat. Tit. 31, § 474.490 (Vernon's 1956)

sport to give an heir the same right to disclaim that it was believed a legatee or grantee had. The theory underlying such legislation has been that all who refuse to take property should be treated equally and, if the right to disclaim is exercised, the disclaimant would not acquire an interest in property for tax purposes. The instant case, however, holds that a right to receive, even though it had been relinquished, is an interest in property for such purposes and thereby rejects the theory underlying the disclaimer statutes.

It may be possible to decide the instant case without determining the effectiveness, for tax purposes, of the disclaimer statutes. However, the decision below rejects the theory underlying those statutes, directly conflicts with the *Brown* decision and throws the status of the case law into utter confusion. It should not be permitted to stand. A decision of this Court would be in the public interest since it would bring clarity to an important but confusing area of estate and gift taxation.

II.

Did the decedent make a transfer?

The question of transfer arises only if it is first determined that the decedent had an interest in property, be-

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[2] (Continued)

North Carolina—N.C. Gen. Stat. § 29-10 (1949, Supp. 1961)
Ohio—Ohio Rev. Code Ann. § 2105.06.1 (Page's, 1954, Supp. 1961)
Pennsylvania—Penn. Stat. Ann. Tit. 20 § 301.3 (Purdon's, 1950, Sup. 1961)
Rhode Island—R.I. Gen. Laws Ann. §§ 34-5-1 to 34-5-12 (1956)
West Virginia—W. Va. Code Ann. § 4095 a (1961)
Wisconsin—Wisc. Stat. Ann. § 237.01 (8) (West's, 1957, Sup. 1960).

cause a transfer is dependent on there having been an interest which was capable of being given up by one and received by another.

Even assuming an interest in property is found, the decision of the Court of Appeals in the instant case is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Brown* v. *Routzahn*, 63 F. 2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933) as to whether a transfer occurred.

The decision of the Court of Appeals in the instant case states: "Looking at the critical 1940 amendment it is apparent that what did happen was that *each* beneficiary postponed his or her *right* to receive an equal share of the trust corpus." The court found that the decedent had made a transfer by joining in the 1940 postponement. Thus, the question is whether a postponement is the equivalent of a transfer for federal estate tax purposes.

The decedent in the instant case survived the period established by the 1940 postponement and, at the end thereof, had exactly the same rights and interests she previously had. The purpose of the postponement was to maintain the status quo. No other person acquired anything because of the postponement. In her will, however, the decedent exercised her power to appoint to a lineal descendant of the settlor. It was because of her exercise of this tax-free power, and not because of the postponement, that any interest passed to another.

The *Brown* case held that a rejection of a right to receive property was not a transfer even though, because of the rejection, title to the property passed to others. The Court of Appeals in the instant case determined that the critical 1940 postponement resulted in a transfer even though no interest passed to any other person. No

other case has been discovered which finds a transfer without a recipient.

The decision of the Court of Appeals in the instant case can have a dramatic effect on the basic concept that the estate tax is a transfer tax since here no person received anything from the decedent as a consequence of the postponement.

It would be in the public interest for this court to render a decision which would resolve the conflict between the *Brown* decision and that of the Court of Appeals in the instant case and provide a coherent basis for determining the types of transactions which constitute transfers for estate and gift tax purposes.

III.

Did the decedent retain an interest for life?

Even if it is determined that the decedent had an interest in property which she transferred, it is necessary, before taxability can result, to conclude that the decedent, by such transfer, had retained an interest for at least one of the periods specified in section 2036.

The Court of Appeals found that in 1940, the decedent "joined in the amendment extending the trust for ten years." The decision later states: "The transfer was with a retained interest—an interest in the income of the trust for her life." However, the 1940 amendment retained income not for her life but for only ten years. The period was determinable without reference to her death and she in fact survived the ten-year period. Because the decedent's participation in the postponement of the trust bore no relationship to her death, the effect of the decision of the Court of Appeals in the instant case is to hold that the estate tax is not a death tax.

The decedent's right to receive income until her death was established only because of the actions of others, taken in 1955, without the decedent's consent and over which she had no control. Section 2036 covers actions taken by a decedent, but has no application to actions taken by others.

To hold that a retention of income for a specified period is a retention for life even though the decedent survived the specified period, or to hold that taxability results because of the uncontrollable action of others, is to step outside the clear language of section 2036. It is respectfully suggested that such variations from the language of that section should be made only by Congress. "The tax here does not fall upon the shifting of the economic benefits in property, but upon the shifting of those benefits by a particular method * * * and not otherwise." *Helvering v. Grinnell*, 294 U. S. 153, 156 (1934).

A collateral problem of value is raised by the decision below.

The decedent's right to corpus was not only contingent upon her survival of the term of the spendthrift trust but was also subject to postponement by others without her consent and was in fact so postponed by others beyond her lifetime.

The decision of the Court of Appeals states: "Although decedent's right to her share of the corpus might have been postponed without her consent by two-thirds of the beneficial interests and the trustees, this in fact did not happen." But this in fact is exactly what did happen on January 31, 1955, the date of the 1955 extension amendment. At that time the decedent was an adjudged incompetent and took no action relative to that extension. (Stip-

ulation, Appendix for Appellant, page 12, paragraph 9; Exhibit L, Appendix for Appellee, p. 34a).

It is believed that a beneficiary's equitable share in the corpus of a spendthrift trust, which is subject to postponement by others without her consent and was in fact so postponed by others beyond her lifetime, is of no value for federal estate tax purposes. At no time could the decedent have secured a distribution of corpus. The tax assessed, however, was based on the value of corpus as though it had been distributed to her, instead of on the value of her interest, if any, before distribution. The result is to base a tax on the value of property which was quite different in character and value from the equitable share in the trust corpus which the court found to be taxable.

It is respectfully submitted that there is no basis in the law for such a levy and that the decision of the Court of Appeals establishes a precedent which should not be permitted to stand.

The final decision in the instant case, which is concerned with section 2036 of the Internal Revenue Code of 1954[2] will also have a direct bearing on the proper interpretation of sections 2037[4], 2038[5], 2033[6], and 2501[7] of the Internal Revenue Code of 1954 which also deal with transfers of interests in property. This conclusion is based on the similarity in the language of these provisions.

CONCLUSION.

For the foregoing reasons, this petition for a writ of Certiorari should be granted.

Respectfully submitted.

JUSTIN A. STANLEY,
GENE C. DAVIS,
Counsel for Petitioner.

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[2](a) **General Rule.**—The value of the gross estate shall include the value of all property * * * to the extent of any interest therein of which the decedent has at any time made a transfer * * *. 26 U.S.C. §2036 (1958).

[4](a) **General Rule.**—The value of the gross estate shall include the value of all property * * * to the extent of any interest therein of which the decedent has at any time * * * made a transfer * * *. 26 U.S.C. §2037 (1958).

[5](a) **In General.**—The value of the gross estate shall include the value of all property * * * (1) to the extent of any interest therein of which the decedent has at any time made a transfer * * *. 26 U.S.C. §2038 (1958).

[6] The value of the gross estate shall include the value of all property * * * to the extent of the interest therein of the decedent * * *. 26 U.S.C. §2033 (1958).

[7](a) **General Rule.**—* * * a tax, * * * is hereby imposed on the transfer of property * * *. 26 U.S.C. § 2501 (1958).

The texts of these statutory provisions are printed in Appendix A.

APPENDIX A.

INT. REV. CODE OF 1954 § 2036, 26 U.S.C. § 2036 (1958):

Sec. 2036. Transfers With Retained Life Estate.

(a) GENERAL RULE.—The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate persons who shall possess or enjoy the property or the income therefrom.

(b) LIMITATION ON APPLICATION OF GENERAL RULE.—This section shall not apply to a transfer made before March 4, 1931, nor to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includible in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

INT. REV. CODE OF 1954 § 2037, 26 U.S.C. § 2037 (1958):

Sec. 2037. Transfers Taking Effect At Death.

(a) GENERAL RULE.—The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if—

(1). possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and

(2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

(b) SPECIAL RULES.—For purposes of this section, the term "reversionary interest" includes a possibility that property transferred by the decedent—

(1) may return to him or his estate, or

(2) may be subject to a power of disposition by him,

but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, under regulations prescribed by the Secretary or his delegate. In determining the value of a possibility that property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate. Notwithstanding the foregoing, an interest so transferred shall not be included in the decedent's gross estate under this section if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's life through the exercise of a general power of appointment (as defined in section 2041) which in fact was exercisable immediately before the decedent's death.

INT. REV. CODE OF 1954 § 2038, 26 U.S.C. § 2038 (1958):

Sec. 2038. Revocable Transfers.

(a) IN GENERAL.—The value of the gross estate shall include the value of all property (except real property situated outside of the United States)—

(1) TRANSFERS AFTER JUNE 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

(2) TRANSFERS ON OR BEFORE JUNE 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph.

(b) DATE OF EXISTENCE OF POWER.—For purposes of this section, the power to alter, amend, revoke, or terminate shall be considered to exist on the date of the decedent's death even though the exercise of the power is

subject to a precedent giving of notice or even though the alteration, amendment, revocation, or termination takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose, if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

INT. REV. CODE OF 1954 § 2033, 26 U.S.C. § 2033 (1958):

Sec. 2033. Property In Which The Decedent Had An Interest.

The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of the interest therein of the decedent at the time of his death.

INT. REV. CODE OF 1954 § 2501 (1958):

Sec. 2501. Imposition of Tax.

(a) GENERAL RULE.—For the calendar year 1955 and each calendar year thereafter a tax, computed as provided in section 2502, is hereby imposed on the transfer of property by gift during such calendar year by any individual, resident or nonresident, except transfers of intangible property by a nonresident who is not a citizen of the United States and who was not engaged in business in the United States during such calendar year.

* * *

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1961 JANUARY SESSION, 1962

No. 13494

MILDRED SEXTON, EXECUTOR OF THE LAST WILL OF BERTHA BIRK KLEIN, DECEASED, *Plaintiff-Appellant*, v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	On Appeal from the Judgment of the United States District Court for the Northern District of Illinois.

March 22, 1962

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Plaintiff, Mildred Sexton, executor of the last will of Bertha Birk Klein, deceased, brought this action for refund of federal estate taxes. The requested refund represented the payment of a deficiency of $67,928.87, plus interest, asserted against the estate and attributable to the inclusion in the gross estate of $317,493.72 as the value of decedent's interest under a trust agreement known as the "Jacob Birk Realty Agreement." The District Court denied the refund and this appeal followed.

The case was submitted to the trial court on a stipulation of agreed facts. The trust was established in 1918 by Jacob Birk. Its corpus consisted of certain real estate

in Cook County, Illinois. The decedent was one of seven children of Jacob Birk named as beneficiaries. In the event of the death of the children before the termination of the trust their respective interests in it were devisable and descendable to only lineal descendants of the settlor.

The trust agreement gave the trustees broad power to control and manage the property held in trust. It provided that the beneficiaries had only an interest in the income or net avails or proceeds of the trust property.

Article VI of the trust agreement provided that the trust "shall terminate at the expiration of twenty years after the death of said Jacob Birk." Jacob Birk died March 2, 1920; consequently, the prescribed termination date would be March 2, 1940, at which time the trustees were to divide the corpus among the beneficiaries in proportion to the value of their respective interests.

Article V of the agreement stated that the trust instrument "may be amended and modified from time to time by an instrument in writing, delivered to the Trustees, signed by the Beneficiaries owning and holding at least two-thirds in value of the certificates issued hereunder by the Trustees, and by at least a majority of the then existing Trustees."[1]

On January 18, 1940 all of the trustees and all of the beneficiaries joined in executing the first of three purported extensions of the duration of the trust. This instrument amended Article VI so that the termination date would be thirty rather than twenty years after the settlor's death.

On February 20, 1950 a second purported extension of the trust was undertaken by the owners of at least two-thirds in value of the beneficial interests and all the trustees. This amendment provided that the trust was to terminate thirty-five years after the death of Jacob Birk. Thus the trust was purportedly extended to March 2, 1955. A third purported extension of the trust was under-

[1] Three of the original beneficiaries were named as trustees by Jacob Birk. An amendment of December 8, 1933 provided for four successor trustees, all original beneficiaries. By the terms of this amendment decedent succeeded to the position of trustee in 1937.

taken on January 31, 1955 by not less than two-thirds of the beneficial interests and by all the trustees. This amendment purportedly extended the termination date to March 2, 1965. The decedent died on October 22, 1955.

The government's first contention is that the original trust terminated on March 2, 1940 according to its original terms because under Illinois law the general power to amend contained in Article V did not include a power to extend so fundamental a provision as the termination date absent a specific indication that this was intended by the settlor; consequently, the purported extension in 1940 was in effect a new trust created by the beneficiaries resulting in a transfer by decedent of an interest in property within the meaning of Section 2036, 2037, and 2038 of the Internal Revenue Code. 26 U.S.C. §§2036, 2037 and 2038.

We must look to Illinois law to determine whether the trust was validly extended beyond March 2, 1940, the termination date specified in the trust agreement. The government relies upon *Olson* v. *Rossetter*, 399 Ill. 232, 77 N.E.2d 652, and plaintiff relies upon *Morris* v. *The Broadview, Inc.*, 328 Ill. App. 267, 65 N.E.2d 605 and *Morris* v. *The Broadview, Inc.*, 338 Ill. App. 99, 86 N.E. 2d 863. The first *Morris* case was decided before *Olson* and the second *Morris* case was decided after *Olson*.

Both *Olson* and the *Morris* cases involved an attempted amendment to extend the termination date of voting trusts created in reorganization proceedings under the Bankruptcy Law. In *Olson* the Illinois Supreme Court held that a trust agreement which provided that the trust "shall terminate in any event" on a certain date could not be amended so as to extend that date even though another section of the trust agreement provided that the trustees could amend, alter or modify the trust agreement. The object in construing the instrument was to ascertain the intent of the parties to the trust agreement and the court held that the words "in any event" gave sufficient indication that it was not intended that the power to amend should extend to the termination date.

The two *Morris* cases, involving the same trust agreement, were decided by the Illinois Appellate Court. The court allowed an extension of the termination date of the trust agreement by an amendment by the trustees acting under a provision in the agreement giving them the general power to amend, alter or modify. *Olson* was distinguished by the Appellate Court primarily on the ground that the Olson trust agreement contained the words "in any event" in reference to the termination date which the Morris trust agreement did not.

We are aware that in construing the instant agreement we must attempt to ascertain the intent of the settlor and this necessarily means that the instrument must be considered as a whole and in context with its entire factual setting. It is apparent, however, that in *Olson* it was the words "in any event" which enabled the court to ascertain the settlor's intent. In *Morris* as in the instant case this language is not present. Furthermore, in our view there is nothing in the instant trust agreement which distinguishes it from the Morris trust agreement. Consequently, we hold that the Jacob Birk trust construed in accordance with Illinois law does not indicate an intent of the settlor that the general power to amend should not apply to the termination date.

The government's second contention is that even though the trust was validly extended and did not terminate in 1940, the result for federal estate tax purposes should be the same as if it had terminated. The government's position is that while local law determines the nature of a decedent's interest in property, federal law dictates which property interests should be included in a decedent's gross estate. It argues that the 1940 amendment of the Jacob Birk Realty Agreement extending the duration of the trust was tantamount to a transfer of the decedent's property with retention of interests within the meaning of Sections 2036, 2037 and 2038.

Plaintiff, on the other hand, argues that these sections of the Internal Revenue Code apply only if the decedent made a transfer of a property interest and that Article III of the trust agreement specifically provided that the

beneficiaries should have no interest in the corpus of the trust but "only an interest in the income." Plaintiff further contends that because of the power to amend in Article V decedent had no absolute right to her pro rata share of the trust corpus at the expiration of the twenty-year period; that by a vote of the trustees and two-thirds of the beneficial interests the duration could have been extended without decedent's consent; and therefore decedent had only an expectancy in the corpus and no power to secure or transfer her interest in it.

A relinquishment of a right may be considered a transfer of property for federal tax purposes. *Cerf* v. *Commissioner*, 3 Cir., 141 F.2d 564. In view of our holding that the Jacob Birk trust could be validly extended beyond its original terminal date, the tax liability depends upon whether the decedent had a right to receive her equal share of the trust corpus in 1940 and, if so, whether she relinquished such right by joining in the extension of the trust.

Plaintiff contends that decedent could not relinquish a right to an equal share of the corpus which share would have been hers in 1940 if there had been no extension of the trust. According to plaintiff, decedent did not have a right to the corpus because she could not unilaterally prevent the extension of the trust if two-thirds of the beneficial interests and the trustees desired to extend; consequently, she relinquished no *right* to property when she joined in the 1940 extension.

Plaintiff's argument might be persuasive if decedent had not in fact joined with the other beneficiaries to extend the trust. In 1940, however, *all* beneficiaries joined in the amendment extending the trust for ten years. This joint action unquestionably constituted a relinquishment by the group, severally and jointly, of the property interests in the corpus which would have been distributed to them absent an extension of the trust. Actually, therefore, decedent by participating in the group action affirmatively acted to relinquish her right to her share of the trust corpus.

Although decedent's right to her share of the corpus might have been postponed without her consent by two-thirds of the beneficial interests and the trustees, this in fact did not happen. Looking at the critical 1940 amendment it is apparent that what did happen was that *each* beneficiary postponed his or her *right* to receive an equal share of the trust corpus. Since the postponement prevented the beneficiaries from receiving their respective shares of the corpus we conclude that the action of postponement participated in by the decedent was a relinquishment of her property right.

A further indication that the initial extension in 1940 by amendment was a surrender by each beneficiary of his or her right to the corpus at the termination date is contained in the amendment itself. This amendment unlike other amendments specifically recited that the action to extend was being taken by all the beneficiaries and the trustees.

We have considered the rationale expressed in *Brooks v. Welch*, 25 F. Supp. 819, cited by plaintiff, and reject it insofar as it is inconsistent with our holding.

Once it is determined that decedent relinquished a property interest, there can be no doubt that the value of decendent's equitable share in the trust corpus is taxable at least under Section 2036 (a)(1)[2] Decedent affirmatively relinquished her right to receive her share in the corpus and thereby is considered to have made a transfer of her property interest in the corpus. The transfer was with a retained interest—an interest in the income of the trust for her life. This is sufficient to make the transfer includible in decedent's gross estate under Section 2036.

The judgment of the District Court is affirmed.

---

[2] (a) *General Rule.*—The value of the gross estate shall include the value of all property * * * to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he had retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from the property, or. . . .

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Thursday, March 22, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

MILDRED SEXTON, Executor of the Last Will of Bertha Birk Klein, Deceased,

Plaintiff-Appellant,

No. 13494 vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, April 18, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

MILDRED SEXTON, Executor, etc.,
Plaintiff-Appellant.

No. 13494 vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX C.

BROWN v. ROUTZAHN,
Collector of Internal Revenue.

No. 6086.

Circuit Court of Appeals, Sixth Circuit.
March 17, 1933.

Appeal from the District Court of the United States for the Northern District of Ohio; Samuel H. West, Judge.

Suit by Fayette Brown, executor of the estate of Harvey H. Brown, deceased, against C. F. Routzahn, Collector of Internal Revenue. From a judgment dismissing the complaint [58 F.(2d) 329], plaintiff appeals.

Reversed and remanded.

Horace Andrews, of Cleveland, Ohio (Thomas F. Patton and Andrews & Belden, all of Cleveland, Ohio, on the brief), for appellant.

Wm. T. Sabine, of Washington, D. C. (Wilfred J. Mahon and John B. Osmun, both of Cleveland, Ohio, and C. M. Charest, of Washington, D. C., on the brief), for appellee.

Before MOORMAN, HICKS, and HICKENLOOPER, *Circuit Judges.*

MOORMAN, *Circuit Judge.*

This is a suit to recover a tax of $116,012.53 exacted from the estate of Harvey H. Brown under the provisions of section 402 (c) of the Revenue Act of 1921 (42 Stat. 278). The tax was assessed by including in the decedent's estate at the time of his death the value of one-third of the estate of his deceased wife, Elizabeth Brown. Upon the trial a jury was waived and the case submitted to the trial court, which made findings of fact and law upon which it rendered judgment dismissing the complaint.

Elizabeth Brown died in 1912. By item 2 of her will she gave to her husband one-third of all her property, real,

personal, and mixed, of which she should die possessed. By the same item and by a codicil she gave to him for his natural life, or so long as he might desire to occupy the same, the use of two houses, with their contents, in order to provide a suitable and convenient home for him and her children. By item 3 she devised and bequeathed all the residue of her estate to Harvey H. Brown, her son Fayette Brown, and a trust company of Cleveland, as trustees, with power to manage and control the same, and after paying enumerated expenses, to pay the income therefrom to Harvey H. Brown during his life and after his death to her children until they respectively reached the age of thirty years, when the principal was to be distributed to them. Item 4 provided that all the provisions in her will made for the benefit of her husband were intended to be, and should be, in lieu of all dower or other interest in her property created or conferred by law.

The will and codicil were admitted to probate June 10, 1912, and on the following day letters testamentary were issued to the named executors. On December 28, 1912, Harvey Brown appeared in the probate court and elected to take under the provisions of the will. On August 18, 1913, the probate court formally approved the nominations of the testamentary trustees. Although the estate seems to have been ready for settlement at that time, or, indeed, earlier, the executors made no final settlement or distribution of it until April 12, 1920, nearly seven years after the qualification of the testamentary trustees. The reason for this, as stated by the appellant, was that, after consultation, he and his father determined that it would be inadvisable to turn the estate over to the trustees because the Guardian Savings & Trust Company would have to be consulted as to its management and would be entitled to be paid for its services.

On March 31, 1920, the executors filed in the proper probate court an application for an order of distribution of the estate "in kind." The application alleged that Harvey H. Brown had refused to accept the one-third of his wife's property bequeathed and devised to him by her will,

and had filed with the executors his formal renunciation thereof, that he had reserved, however, the life estate in the residence properties and also his right to receive the income from the estate under the trust created by item 3 of the will. It further alleged that by reason of such renunciation all the property of the estate except the portions so reserved became a part of the residue devised and bequeathed to the testamentary trustees. Harvey H. Brown filed with and as a part of the application a writing signed by him and purporting to be a renunciation of his right to one-third of the estate. On the hearing of the application, the court determined that, excepting the income from the principal and the right to the use of the residences, Brown had renounced all interest in and to the estate, and particularly the one-third part devised and bequeathed to him absolutely, and that by virtue thereof all assets held by the executors became a part of the residue of the estate and subject to the trust created by item 3 of the will. The court accordingly ordered that all of the properties held by the executors be distributed in kind to the testamentary trustees. Shortly thereafter the executors transferred the assets of the estate to the trustees and filed with the court a statement of the transfer as their account of distribution, which was approved. Harvey H. Brown, in his individual capacity, consented to the distribution, and joined also with the other trustees in receipting for the securities. On July 1, 1920, he executed quitclaim deeds to the North Point Realty Company to his one-third interest in the residence properties, for which properties the grantee issued 4,000 shares of its stock to the trustees of his wife's estate.

There were no debts against Elizabeth Brown's estate, and from the date of her death until the distribution thereof the executors paid the income therefrom to Harvey H. Brown. Mr. Brown was a man of large means, and in April of 1920 was 72 years of age. Some of his children and business associates testified that after the will was probated he stated at different times that he did not intend to accept the gift of one-third of his wife's property.

Strictly construed, some of his statements, as detailed by the witnesses, indicate an intention not to accept the income from the estate. A daughter testified that he said to her he did not wish "to use my mother's property; that he wished that to come to the children intact as she had left it, and that he didn't need the use of it in any way. He wished it to come to us children." The testimony of other witnesses indicates that he expressed the purpose merely not to take one-third portion of the estate.

The court found: (1) That the decedent owned and was entitled to the entire beneficial interest in and to one-third of his wife's estate from and after her death until the distribution thereof by her executors; (2) that the distribution of the estate in April of 1920 to which Brown in his personal capacity consented amounted under the circumstances to a transfer by him of his one-third interest in the estate to the testamentary trustees; and (3) that such transfer was made in contemplation of death within the meaning of section 402 (c) of the Revenue Act of 1921.

It is obvious that, unless Brown accepted the gift of one-third of the estate or became the owner of such interest therein prior to April of 1920 as was transferred within the meaning of the Revenue Act, there could be no transfer in contemplation of death. In holding that there was an acceptance, the court below adopted the view that the gifts under item 2 of the will were intended as an entirety, and that the acceptance of either the use of the Cleveland residence or the income arising from the one-third of the estate amounting to an acceptance of the principal. The court was also of opinion, that, if separate gifts of one-third of the property and the use of the residence were intended, the acceptance of the income from the one-third constituted an acceptance of the principal and precluded renunciation. We think the court erred in these views.

[1, 2] Where a testator makes two separate and distinct gifts, one beneficial and the other burdensome, the donee may undoubtedly accept the beneficial gift and reject the other, but; where there is a single gift, including burdensome and beneficial properties as an aggregate, then,

unless a contrary intention appears from the will, the donee cannot disclaim the burdensome gift and accept the beneficial one. Page on Wills, § 1233. There is nothing in the record in this case to indicate that the gift of one-third of the property was burdensome nor in our view that that gift and the gift of the right to use the Cleveland residence was a single gift. The testator first gave to her husband a one-third interest in all of her property, including the Cleveland residence. After concluding this gift, she then gave him in another provision the right to use the Cleveland residence for life. The latter was a separate and distinct gift, and we can perceive in the reason for it, as stated by the testator, no purpose or intention to make its acceptance or enjoyment dependent upon an acceptance of the other gift.

[3-5] With this question aside, we may state certain propositions which are conceded or are too well established to admit of doubt. First, under the Ohio law the only effect of the formal election of the decedent to take under the will was to bar his right of curtesy; it was still open to him to accept or reject the gift. Section 10572, Ohio General Code; Carder v. Board of Com'rs of Fayette County, 16 Ohio St. 354, 357. Next, there is no law in Ohio limiting the time in which a donee may reject or accept a testamentary gift. Further, the acceptance or renunciation need not be in writing, but may be effected by any deliberate and unequivocal act indicating that intention. 2 Page on Wills (2d Ed.) pp. 2059, 2060. It should also be said that the decedent could have owned or held a transferable interest in the one-third part of the estate without holding the legal title or having it in possession.

[6, 7] In the light of the above statements, the situation presented is, so far as we are informed, without precedent. The decedent was in possession of the estate from 1912 until it was transferred to the trustees in 1920. It was not, however, in his possession as donee, but as a coexecutor. Nevertheless, at any time within that period he could have taken the one-third or made a renunciation that would have estopped him from claiming it. He did neither. It

may be conceded, too, we think, that, had he died at any time between 1912 and the date of the distribution, this property would have passed under a general devise in his will, or, leaving no will, would have passed under the laws of descent and distribution as a part of his estate. Armstrong v. Grandin, 39 Ohio St. 368; Whitehead's Estate, 268 Pa. 407, 112 A. 16. The presumption arising from the beneficial character of a gift would have required that result. Strom v. Wood, 100 Kan. 556, 164 P. 1100; Bradford v. Leake, 124 Tenn. 312, 137 S. W. 96, Ann. Cas. 1912D, 1140; Albany Hospital v. Albany Guardian Society, 214 N. Y. 435, 108 N. E. 812, Ann. Cas. 1916D, 1195. Superficially this would seem to fix a transferable interest in the donee as of the date of the distribution. On the other hand, however, the law of Ohio does not require a donee to accept or reject a gift within any specified time, and a rejection made at any time before distribution is valid. We thus have a situation where, had the decedent died within the period of administration, the property would have passed as a part of his estate, but living, he had the right, at any time before distribution, to reject the gift. In the one case the presumption of acceptance would carry through; in the other, it would be rebutted by renunciation. The question is therefore narrowed to the inquiry as to whether the doing of an act which the donee had the right to do, the rejecting of the gift, was a transfer within the meaning of the statute taxing transfers in contemplation of death.

While it has been held that taxing statutes of this character concern themselves, not so much with title as with command over the property (Saltonstall v. Saltonstall, 276 U. S. 260, 48 S. Ct. 225, 72 L. Ed. 565; Chase National Bank v. United States, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388; Corliss v. Bowers, 281 U. S. 376, 378, 50 S. Ct. 336, 74 L. Ed. 916; Tyler v. United States, 281 U. S. 497, 503, 50 S. Ct. 356, 74 L. Ed. 991, 69 A. L. R. 758; Burnet v. Guggenheim, 53 S. Ct. 369, 77 L. Ed., —, Feb. 6, 1933), we cannot think that within the scope of that purpose the statute here in question con-

templates the taxing of the renunciation of testamentary gifts. Specifically stated, it is our view that, had Elizabeth Brown died in January of 1920, the renunciation here involved, made the following April, could not be held to be a transfer under the statute; even though it were made in contemplation of death. If in that case the renunciation would not be a transfer, neither is it here. The decedent never owned nor had control of the property as donee. All that he had was a right to accept. Coupled with this right was an equal right to reject. Either could be exercised so long as the estate was in administration. He did reject. The government had no fixed prior right such as a precedent judgment creditor might have had. Cf. Strom v. Wood, supra; Crumpler v. Barfield & Wilson Co., 114 Ga. 570, 40 S. E. 808; Schoonover v. Osborne, 193 Iowa, 474, 187 N. W. 20, 27 A. L. R. 465. Its right, as claimed, grew out of the act said to give rise to the tax liability, the exercise of an option. What it did was to collect a tax, not upon the transfer of an interest in property, but upon the exercise of a right to refuse a gift of property. This we think it had no right to do.

The judgment is reversed, and the cause remanded for a new trial.

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No. 208

In the Supreme Court of the United States

OCTOBER TERM, 1962

MILDRED SEXTON, EXECUTOR OF THE LAST WILL OF BERTHA BIRK KLEIN, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LOUIS F. OBERDORFER,
Assistant Attorney General,
I. HENRY KUTZ,
MORTON K. ROTHSCHILD,
Attorneys,
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Washington 25, D.C.

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648643—62

QUESTION PRESENTED

The decedent and other beneficiaries of a trust created by their father agreed to extend the term of the trust, thus postponing the distribution to them of the trust corpus. As a result, the decedent retained the right to the income from her share of the corpus for a period which did not in fact end before her death. The question is whether the value of decedent's share of the trust corpus should be included in her gross estate under Section 2036(a)(1) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 2036. TRANSFERS WITH RETAINED LIFE ESTATE.
>
> (a) *General Rule.*—The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—
>
> (1) the possession or enjoyment of, or the right to the income from, the property, or
>
> (2) the right, either alone or in conjunction with any person, to designate the persons who

shall possess or enjoy the property or the income therefrom:

* * * * * *

(26 U.S.C. 2036(a).)

STATEMENT

The facts, which were stipulated (R. 10-14), may be summarized as follows:

Bertha Birk Klein (the decedent) died on October 22, 1955. (R. 4.). Jacob Birk, her father, had created a trust in 1918, the corpus of which consisted of certain real estate in Cook County, Illinois. (Supp. R. 8a-28a.) The decedent was one of seven children of Jacob Birk named as beneficiaries, and was given a one-seventh interest in the income of the trust (Supp. R. 19a), evidenced by a trustees' certificate (Supp. R. 20a-21a), and also a one-seventh interest in the corpus of the trust upon termination (Supp. R. 25a). In the event of the decedent's death before termination of the trust, her interest was to go to the person or persons appointed by her in her last will, subject to the proviso that the appointee must be a lineal descendant of the settlor. In default of appointment, the interest would pass to her executrix, administratrix or legal representative. (Supp. R. 21a, 25a.)

Article VI of the trust agreement provided that the trust "shall terminate at the expiration of twenty years after the death of said Jacob Birk." (Supp. R. 25a.) Jacob Birk died on March 2, 1920. (Pet. 6a);

[2] "Supp. R." references are to the appendix to the Government's brief filed in the court of appeals.

consequently, the prescribed termination date was March 2, 1940.

Article V of the agreement stated that "This agreement may be amended and modified from time to time by an instrument in writing, delivered to the Trustees, signed by the Beneficiaries owning and holding at least two-thirds in value of the certificates issued hereunder by the Trustees, and by at least a majority of the then existing Trustees." (Supp. R. 24a–25a.)

On January 18, 1940, all of the trustees and all of the beneficiaries joined in executing the first of three purported extensions of the duration of the trust. This instrument amended Article VI so that the termination date would be thirty rather than twenty years after the settlor's death. (Supp. R. 29a–30a.) A second extension provided that the trust was to terminate thirty-five years after the death of Jacob Birk, *i.e.*, on March 2, 1955. (Pet. 6a; Supp. R. 31a–33a.) The final amendment extended the date to March 2, 1965. (Pet. 6a–7a; Supp. R. 34a–35a.)

The decedent exercised her testamentary power to appoint her share of the corpus to a lineal descendant of the settlor and, under her will, the petitioner acquired the beneficial interest of the decedent, her mother, in 1955. (R. 12; Pet. 11.)

The petitioner, as executor of her mother's will, brought this action for refund of federal estate taxes representing the payment of a deficiency of $67,928, plus interest, asserted against the estate and attributable to the inclusion in the gross estate of $317,493 as

---

[3] On April 9, 1954, when the decedent was 91 years of age, she was judicially declared an incompetent and a conservator of her estate was appointed. (R. 12.)

the value of the decedent's interest in the corpus under the trust agreement. Both courts below denied the refund. (Pet. 5a.)

ARGUMENT

Contrary to petitioner's suggestion, this case presents no question of general importance appropriate for review by this Court. The decisions below turn upon the construction of the language of a particular and unusual trust instrument. Nor is the claim of conflict well founded.

1. Section 2036(a) of the Internal Revenue Code of 1954, *supra*, pp. 2–3, provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, under which he had retained, for life or for any period which does not in fact end before his death, the right to the income from the property. In this case the decedent was one of several income beneficiaries of an *inter vivos* trust created by her father in 1918, which was to terminate twenty years after his death. Upon termination, the decedent and the other life income beneficiaries would each be entitled to receive a fractional share of the trust corpus. (Supp. R. 25a–26a.) The decedent's father died in 1920 (Pet. 6a), and, therefore, according to its terms, the trust was to terminate in 1940. Just prior to the termination date, all of the trustees and all of the then living beneficiaries (including the decedent) joined in executing an instrument which postponed termination for a period of years. (Pet. 6a; Supp. R. 29a–30a.) Accordingly, although the

decedent had a right to receive her share of the trust corpus in 1940, she relinquished that right by joining with the other beneficiaries and the trustees in extending the trust term. As the court below concluded (Pet. 9a):

> This joint action unquestionably constituted a relinquishment by the group, severally and jointly, of the property interests in the corpus which would have been distributed to them absent an extension of the trust. Actually, therefore, decedent by participating in the group action affirmatively acted to relinquish her right to her share of the trust corpus.

Such relinquishment of her rights in the corpus, as the court of appeals further stated (Pet. 10a), constituted a "transfer of her property interest" therein.[4] If this is so, as seems plain, then there can be no question that the other pertinent conditions of Section 2036(a)(1) were met. Petitioner did retain the right to receive the income for a period which did not in fact end before her death.[5]

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[4] The relinquishment of a right to control the amendment of a trust instrument has similarly been held to be a transfer for federal gift tax purposes. *Carf* v. *Commissioner*, 141 F. 2d 564, 566–567 (C.A. 3d). Compare *Hardenbergh* v. *Commissioner*, 198 F. 2d 63 (C.A. 8th), certiorari denied, 344 U.S. 836.

[5] The Government also argued in the courts below that the amendment of the agreement extending the duration of the trust was tantamount to a transfer of the decedent's property with retention of interest within the meaning of Section 2037 (transfers taking effect at death) and Section 2038 (revocable transfers) of the Internal Revenue Code of 1954 (26 U.S.C. 2037 and 2038), as well as Section 2036. (Pet. 8a.) However, the court below found it unnecessary to pass on the other cited sections, viewing the trust corpus as "taxable at least under Section 2036(a)(1)." (Pet. 10a.)

2. There is no conflict of decisions. The decision of the Sixth Circuit in *Brown* v. *Routzahn*, 63 F. 2d 914, certiorari denied, 290 U.S. 641, upon which petitioner relies (Pet. 4), differs significantly. In that case, the decedent's wife died in 1912 leaving a will under which her husband was given one-third of all her property, real and personal, the residue being left in trust to pay the income to him for life, with remainders over. The will provided that the gifts to the husband were in lieu of dower. The decedent-husband came into probate court about six months after his wife's death and elected to take under the will. In 1920, the executors of the wife's estate filed an application for an order of distribution of her estate, attached to which application was a renunciation of the decedent's right to one-third of the estate. The probate court thereupon ordered all of the property in the wife's estate to be distributed to the testamentary trustees. When the decedent died three years later, at the age of 75, the Commissioner of Internal Revenue determined that the renunciation by the decedent was a transfer in contemplation of death under the pertinent provision of the Revenue Act then in force, and included the value of the renounced property in the decedent's gross estate. The estate paid the tax, filed a claim for refund, which was denied, and then filed suit in the district court. After that court dismissed the complaint, the Sixth Circuit reversed the judgment on the ground that the law of Ohio does not require a legatee to accept or reject a bequest within any specified time, and that a rejection made at any time before distribution is valid; the court also

held that the decedent never owned nor controlled the property as legatee.

In the instant case, the decedent was both income and remainder beneficiary of an *inter vivos* trust which she and the other beneficiaries accepted at the time the trust was created. (Supp. R. 27a–28a.) Moreover, the instrument dated January 18, 1940, executed by the beneficiaries, recited that they were the *owners* and holders of all the certificates issued under the trust and of all the beneficial interests therein. (Supp. R. 29a–30a.) The agreement of February 20, 1950, signed by the trust beneficiaries also recited that the decedent and the other beneficiaries were "the owners" of not less than two-thirds of the value of the beneficial interests in the trust. (Supp. R. 31a.) The agreement of January 31, 1955, contains a similar recital. (Supp. R. 34a–35a.) Thus there can be no doubt that the decedent and the other beneficiaries accepted their beneficial interests in the trust when it was created in 1918 and the trust corpus was conveyed to the trustees. It follows that when the decedent and the other beneficiaries relinquished their right to receive their respective shares of the trust corpus in 1940 they made transfers of their property interests in the trust corpus which they had owned since 1918. Moreover, the decedent here plainly exercised dominion over the corpus. She made a transfer under which she continued to retain the right to enjoy the income. She also retained and exercised a testamentary power of appointment over the corpus.

The petitioner also argues that the decision below is "probably contrary to the principles underlying this Court's decision in *Helvering* v. *Grinnell*, 294 U.S. 153." (Pet. 4.) In that case, John O. Stone died in 1876, a resident of New York, leaving a will in which he created a trust fund for the benefit of his daughter, Annie, who was to receive the income therefrom during her life, and who had the power to appoint the corpus by last will. In default of such appointment, her share of the estate was to go to her children, or, if there were no issue, to her next of kin. Annie Stone died in 1927, unmarried, without issue and leaving her two sisters as sole next of kin. Her will provided that any property subject to the power of appointment under her father's will should go to her sisters. After her death the two sisters in writing renounced their right to receive the property under her will and elected to take under the provisions of their father's will. The Commissioner of Internal Revenue determined that the value of the trust corpus subject to the power of appointment by Annie should be included in her estate under Section 302(f) of the Revenue Act of 1926, c. 27, 44 Stat. 9. This Court ruled to the contrary, on the ground that the property had not *passed* under the power of appointment. Obviously *Grinnell* has no bearing on the instant case. The issue here does not in any way depend upon whether property passed under the will of the donor of the power of appointment or under the will of the donee of that power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF TO THE BRIEF IN OPPOSITION

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REPLY BRIEF TO THE BRIEF IN OPPOSITION.

The Government's Brief in Opposition fails to come to grips with any of the arguments made in the Petition for Writ of Certiorari. This failure makes it evident that there is no reasonable basis for refuting the position taken by the petitioner.

1. The Brief in Opposition completely ignores the controlling fact that the decedent joined in only the first two extension amendments and survived the periods established by those amendments. The last extension, in 1955, was made during her lifetime without her consent or the consent of her conservator or any other person acting in her behalf. It was the 1955 extension and not the two in which she joined which permitted her to receive income until her death. Instead of acknowledging this fact, the

Government's brief wrestles with the truth when it states the erroneous conclusion that the "Petitioner[1] did retain the right to receive the income for a period which did not in fact end before her death." (Br. in Op. 6)

The fact that the periods during which the decedent retained income had in fact ended prior to her death was made crystal clear in the Petition (pp. 2, 3, 11 and especially 12 and 13). However, it takes a microscopic reading of the Brief in Opposition to find any recognition of this fact. There are only two references to the final amendment. One appears on page 8 and merely states that this amendment contains a recital similar to the ones contained in the earlier extensions. The other appears on page 4 and states that: "The final amendment extended the date to March 2, 1965." A footnote at this point reveals that "On April 9, 1954, when the decedent was 91 years of age, she was judicially declared an incompetent and a conservator of her estate was appointed."

Plainly the Government knew that the decedent did not and could not join in the third extension.

It would seem that candor called for an honest recognition of this controlling fact and plain dealing with the problems it presents.

The Government's treatment of this matter can only lead to the conclusion that it cannot counter the arguments made by Petitioner with respect to it—arguments which are set out on pages 12 and 13 of the Petition.

The estate tax is a death tax. To be taxable thereunder, any transaction must bear some relationship to the decedent's death. This most basic of all estate tax concepts is supported by the language of section 2036 of the Internal Revenue Code of 1954 itself which specifically provides that a transfer which retained rights is includible only if the retention was "for his life or for any period not

[1] Evidently the Government means "Decedent".

ascertainable without reference to his death or for any period which does not in fact end before his death." Such language was necessary in order to make Sec. 2036 conform with the basic principle that the estate tax is in fact a death tax. The Brief in Opposition admits (p. 5) that the decedent joined in executing an instrument which postponed termination "for a period of years." The decedent in fact survived that period of years. No distortion of language or exercise in mental gymnastics can make a period of years which one in fact survives equivalent to one's lifetime. The retention period provisions of Sec. 2036 have obviously not been met.

If permitted to stand, the decision of the Court of Appeals would be authority for the proposition that the estate tax is not a death tax and would be in direct conflict with the fundamental principle underlying estate taxation, which principle needs no citations for support.

Although the Government alleges that "this case presents no question of general importance" (Br. in Op. 5), it is respectfully submitted that any attempt to change radically the very basis for estate taxation without legislative action is in violation of the fundamental constitutional principle of separation of powers. Even if no other problem were involved in this case, the case would be one of great importance.

2. The decision of the Court of Appeals is based upon a consideration of whether the decedent had an interest in property and whether she had made a transfer thereof. These are very broad concepts because it is a requirement in every instance of estate taxation that an interest in property and a transfer thereof be found. Therefore, the decision of the Court of Appeals can have broad application. It is believed that the Petition for Writ of Certiorari points out the revolutionary conclusions reached by the Court of Appeals regarding these concepts and the utter confusion resulting from its opinion.

It is most significant, however, that the Government's Brief in Opposition makes no attempt whatsoever to present any reasoning which might form a basis for finding that the decedent had an interest in property or that she made any transfer thereof. It merely states the conclusion that the ". . . decedent had a right to receive her share of the trust corpus in 1940. . . ." (Br. in Op. 6), without making any attempt to show that she ever could have exercised that right and received the property. It makes no effort to deal with the fact that her right to receive at a future date was contingent upon her survival of the term of the trust and was subject to postponement by others without her consent. The Government then states the further conclusion: ". . . she relinquished that right by joining with the other beneficiaries and the trustees in extending the trust term" (Br. in Op. 6), without saying how an extension can be considered the same as a transfer when nobody received anything because of the extension. The climax of its presentation is found when it jumps to the further conclusion: "Such relinquishment of her rights in the corpus . . . constituted a 'transfer of her property interest' therein," (Br. in Op. 6), without explaining how her right to receive corpus of a spendthrift trust at a future date has suddenly become a property interest in corpus even though the trust instrument provided that no beneficiary should have any interest in corpus until termination.

Similarly, the Brief in Opposition, at three places on page 8, refers to the fact that the decedent was the owner of a beneficial interest in the trust. It then states (Br. in Op. 8, lines 24, 25) that the beneficiaries "made transfers of their property interests in the trust corpus" but does not explain how a beneficial interest in a spendthrift trust can possibly be the same as a property interest in the corpus. By definition a beneficial interest in a trust is not the equivalent of an interest in the property itself.

The Brief in Opposition (p. 8) states: "She made a transfer. . . . She also retained and exercised a testamentary power of appointment over the corpus." It is the corpus that the Government is attempting to tax. It would have been utterly impossible for the decedent to have transferred corpus and still retain the right to transfer it again by exercising a power of appointment.

The Brief in Opposition is rife with conclusions but is devoid of any reason or logic to support those conclusions. It seems evident, therefore, that its conclusions and those of the Court of Appeals are without foundation. If the language of the decision of the Court of Appeals relating to transfers of interests in property is not promptly nullified, taxpayers and their attorneys cannot possibly predict the results of their planning.

3. The Brief in Opposition contends (p. 5) that the claim of conflict is not well founded and that *Brown* v. *Routzahn*, 63 F. 2d 914, certiorari denied, 290 U.S. 641, differs significantly from the instant case (p. 7). Its contention of differentiation is based upon the fallacious assumption that the beneficiaries in the instant case became owners of the trust corpus in 1918 and that they "made transfers of their property interests in the trust corpus which they owned since 1918." (Br. in Op. 8). Article II of the trust instrument (Supp. R. 19a)[2] provides for the issuance of trust certificates and states that: ". . . they, the said Beneficiaries, shall in no event have any greater interest in this trust estate than is set forth in said certificates." The language of the certificates is set out in Article III (Supp. R. 20a, 21a) and provides in part: "And it is expressly agreed that the holder hereof has no claim or interest, legal or equitable, in the lands and other assets and property described and referred to in said trust agreement, but only an interest in the net income,

[2] "Supp. R." references are to the appendix to the Government's brief filed in the Court of Appeals.

avails or proceeds thereof, as in said instrument provided." The trust agreement provides (Supp. R. 11a): ". . . it being understood, however, that the said Beneficiaries do not intend to, and do not hereby or hereunder, acquire any title to the premises and properties aforesaid, either legal or equitable, but an interest only in the net avails and proceeds of the said premises and properties, which may come therefrom to the said Trustees under the terms and provisions of this agreement." The trust agreement further provides (Supp. R. 22a): "The beneficial interests hereunder and in said certificates are declared to be and shall be personal property, and neither the Beneficiaries herein named, nor the holders of any of the certificates hereunder, at any time, shall have any claim, title or interest, legal or equitable in the lands and other assets and property at any time held by the Trustees under this trust, but only an interest in the income, net avails or proceeds thereof."

Can there be any question but that no beneficiary could have an interest in corpus during the term of the trust?

Still the Government bases its argument for distinguishing the instant case and the *Brown* case on the contention that the beneficiaries become *"owners"* in 1918, (Br. in Op. 8), and even resorts to the use of italics in a desperate effort to add weight to its argument. The fact that no better argument is offered points up the fact that there is no real distinction between the two cases and serves only to emphasize the conflict between them.

After reciting the facts in *Helvering* v. *Grinnell,* 294 U.S. 153, the Government again leaps to a conclusion by stating: "Obviously *Grinnell* has no bearing on the instant case. The issue here does not in any way depend upon whether property passed under the will of the donor of the power of appointment or under the will of the donee of that power." (Br. in Op. 9) *Grinnell* has a direct bearing on the instant case since it is Petitioner's precise

contention that no interest in corpus passed from the donor to the decedent and, if no such interest passed to her, it cannot be part of her estate for estate tax purposes. In attempting to determine whether the beneficiaries had received an interest in property from the donor, *Grinnell* is very much in point because, as it stated (p. 155), "... that result was rejected by the beneficiaries."

4. It is also significant that the Brief in Opposition does not deny the impact that the Court of Appeals decision can have on the disclaimer statutes recently enacted.

Of further significance is the fact that the Brief in Opposition does not mention the valuation problem created for the first time by the opinion of the Court of Appeals and discussed on pages 13 and 14 of the Petition. Perhaps, if nothing else, this case should be remanded for a determination of the value of the decedent's equitable share of trust corpus in the light of the fact that such equitable share was contingent upon survival of the term and subject to postponement by others without the decedent's consent and was in fact so postponed by others beyond the decedent's lifetime so that the decedent, at no time, could have requested and received any portion of corpus.

5. It is especially interesting to note that the Brief in Opposition does not contend that the decision of the Court of Appeals is correct and should be permitted to stand. Indeed it cannot make this assertion because startling results are obtained if the theory expressed by the decision is carried to its logical conclusion:

The Court of Appeals found that an estate tax is assessable because the decedent joined in the 1940 extension amendment. The decedent also joined in the 1950 extension amendment. If the theory expressed by the Court of Appeals is applied to the 1950 extension, it appears

that another taxable event occurred in 1950. At that time the decedent had exactly the same interests that she had in 1940 and performed exactly the same act relative thereto. The two situations are identical. If one is taxable, the other must also be taxable.

However, if the decedent relinquished or transferred her interest in corpus in 1940, by what means did she reacquire that interest so she could again transfer it in 1950? If she again transferred the interest in 1950, how was that interest susceptible of being transferred by her a third time by the exercise of her power to appoint by will?

It is thus seen that the decision of the Court of Appeals cannot be correct because it raises unanswerable questions. It forces the untenable conclusion that one can make multiple taxable transfers of a property interest but can continue somehow to bring the interest back to be transferred again. A consistent application of the decision also leads to the inequitable if not unconstitutional conclusion that the decedent's equitable share in trust corpus should be taxed twice in her estate, once because of the 1940 extension and once because of the 1950 extension.

Apart from ignoring the fact that the decedent had no part in the 1955 extension, the basic flaw in the opinion is the misconception that a postponement is the equivalent of a relinquishment. The word "postpone" means "To defer; to put off; delay;" while the word "relinquish" means "To give up; to renounce a claim to; . . . to forsake." *Webster's New International Dictionary, Second Edition.* In 1940 and 1950 the decedent merely joined in deferring, putting off or delaying the time when she might receive corpus. She did not give up, renounce or forsake her right to corpus and nobody acquired any interest from her. At the end of each period of postponement she had exactly the same rights she had previously had. She could not transfer corpus more than once and

the only transaction which passed any interest to any other person was her tax-free exercise of a power to appoint by will. The only conclusion that is supported by definition and by reason and is consistent with basic concepts of estate taxation is that a postponement is not a relinquishment. It is not a transfer. It is not taxable.

6. The Petition has established the fact that the instant case involves questions of broad public interest and impact (pp. 8, 9, 10 and 12), that there is a conflict that requires a resolution (pp. 8, 9, 11 and 12), and that the Court of Appeals committed obvious errors in not considering the fact that the decedent survived the effective dates of her actions and in not attempting to value the asset it found to have been transferred (pp. 12, 13 and 14).

The results of the decision of the Court of Appeals can be righted only by a decision of this Court which would find:

A. No interest in corpus passed from the donor to the decedent. The decedent could have no interest in corpus until the trust terminated. Never having acquired an interest in corpus, a basic requirement for taxation has not been met.

B. By joining in two extension amendments, the decedent made no transfer because nobody received anything from her as a consequence of such extensions. The only transfer of corpus made by her was pursuant to the tax-free exercise of a limited power of appointment. A mere postponement is not a transfer. To hold otherwise would raise unanswerable questions and would produce a ridiculous result.

C. Any transfer that might have been made was not one under which the decedent retained income for any period covered by Section 2036 of the 1954 Code. The periods established by the extension amendments in which she joined had in fact ended

prior to her death. Her acts bore no relationship to her death. A retention for a specified period which the decedent in fact survived is not a retention for life.

D. Even if it should ultimately be determined that the decedent made a transfer of an interest in property under which she retained income for life, the value of the interest transferred must be determined. The Court of Appeals found that her equitable share in trust corpus is taxable. If this is so, her equitable share must be valued in light of its contingency upon survival of the termination of the trust and its dependency on the failure of others to postpone the term without the decedent's consent, together with the fact that it was so postponed by others beyond her lifetime.

7. The Court of Appeals committed error and an injustice has been done to the taxpayer. If the opinion of the Court of Appeals is not nullified, the same injustice can fall to the remaining beneficiaries of the Jacob Birk Realty Agreement and to all others who are guilty of having made or joined in postponements or of having only beneficial interests in trusts or estates.

The injustice and the error have been compounded by the Government's refusal to discuss a material fact and candidly come to grips with any one of the issues presented.

It may be that the instant case is one in which a summary reversal would be warranted.

CONCLUSION.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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